Foh Chong & Sons Sdn Bhd & Anor v Pentadbir Tanah Daerah Johor Bahru

HIGH COURT (JOHOR BAHRU) — APPLICATION FOR JUDICIAL REVIEW NO JA-25–22–06 OF 2021
NOOR HISHAM ISMAIL JC
7 MAY 2023

Land Law — Acquisition of land — Smaller area of land acquired than what was originally stated in statutory notice of acquisition — Whether land administrator's award of compensation was not invalidated merely because of that reason — Whether landowner's and tenant's judicial review application to set aside land administrator's award had no merit as they failed to show they had suffered any loss, damages or prejudice — Land Acquisition Act 1960 s 14(3)

The first applicant owned a piece of land ('the land') that was tenanted by the second applicant ('A2') who had erected a building that housed a restaurant. The respondent gave the requisite notice under the Land Acquisition Act 1960 of the government's intention to acquire 293sqmt of the land for the purpose of building a public railway line linking Johor Bahru and Singapore ('the project'). Before the land enquiry was held, the owner of the project informed the respondent that an amendment had been made to the original layout plan of the railway line so that only 229sqmt of the land would be required for the acquisition. The applicants objected to the amendment saying that it caused the 64sqmt of the land that had been left out of the original acquisition plan together with a part of A2's building to fall within the 'First Reserve' of the 'Railway Protection Zone' as prescribed under the Railways (Railway Protection Zone) Regulations 1998 and thereby posed a restriction or encumbrance to any future plans to develop the land and the building. Despite the objections, the respondent proceeded to hold the enquiry and awarded compensation for only the 229sqmt that was acquired. The applicants objected to the respondent's decision ('the impugned decision') and caused the matter to be referred to the High Court for further determination in a land reference proceeding. At the same time, the applicants filed the instant judicial review ('JR') application to quash the respondent's decision and to compel the respondent to hold a fresh inquiry to acquire the whole of the 293sqmt of the land, as originally planned, together with the whole of A2's building so that post-acquisition no part of any un-acquired portion of the land would be subjected to any restrictions with regard to future development plans.

Held, dismissing the JR application:

(1) The concerns raised by the applicants that they might face restrictions if they wanted to develop the land and building in future were merely speculative in nature. There was no evidence that they had in actual fact taken any step to develop the land or building prior to the land acquisition process and no positive evidence of any serious or actual loss that the applicants had suffered at the time of the acquisition (see paras 37 & 52).

(2) The activities that were restricted from being carried out within the Railway Protection Zone (which inevitably included the First Reserve) and as set out in the 1998 Regulations were merely directory and not mandatory in nature and did not pose any hindrance to any future development plans for the land or building. The impugned decision was therefore not illegal, nor did it offend art 13 of the Federal Constitution (see paras 35, 41–43, 46–47 & 53).

(3) The impugned decision was also not tainted with irrationality or abuse of power because the respondent had power under the Land Acquisition Act ('the LAA') to decide to acquire an area slightly larger or smaller than the area stated in the government *gazette*. This was evident from the wordings in s 14(3) of the LAA. The need to acquire only a relatively smaller area of land in the instant case was also a technical decision and the respondent could not be faulted for reducing the area to be acquired consonant with the amendment made to the original layout plans by the project owner (see paras 54 & 56–57).

(4) The JR application was devoid of merit and the same had to be dismissed (see paras 61–62).

[Bahasa Malaysia summary

Pemohon pertama memiliki sekeping tanah ('tanah tersebut') yang disewakan oleh pemohon kedua ('A2') yang telah mendirikan bangunan yang menempatkan sebuah restoran. Responden memberikan notis yang diperuntukkan di bawah Akta Pengambilan Tanah 1960 mengenai hasrat kerajaan untuk mengambil seluas 293 meter persegi tanah tersebut bagi tujuan membina landasan kereta api awam yang menghubungkan Johor Bahru dan Singapura ('projek tersebut'). Sebelum siasatan tanah diadakan, pemilik projek memaklumkan kepada responden bahawa pindaan telah dibuat kepada pelan susun atur asal landasan kereta api supaya hanya 229 meter persegi tanah diperlukan untuk pengambilan. Pemohon membantah pindaan tersebut dengan mengatakan bahawa ia menyebabkan 64 meter persegi tanah yang telah ditinggalkan daripada pelan pengambilalihan asal berserta sebahagian bangunan A2 jatuh dalam 'Rizab Pertama' 'Zon Perlindungan Kereta Api' seperti ditetapkan di bawah Peraturan-Peraturan Keretapi (Zon Perlindungan Keretapi) 1998 dan dengan itu menimbulkan sekatan atau bebanan kepada sebarang rancangan masa depan untuk membangunkan tanah dan bangunan

tersebut. Walaupun terdapat bantahan, responden terus mengadakan siasatan dan memberikan pampasan untuk hanya 229 meter persegi yang diambil. Pemohon membantah keputusan responden ('keputusan yang dipertikaikan') dan menyebabkan perkara tersebut dirujuk ke Mahkamah Tinggi untuk penentuan lanjut dalam prosiding rujukan tanah. Pada masa yang sama, pemohon memfailkan permohonan semakan kehakiman semasa ('JR') untuk membatalkan keputusan responden dan memaksa responden mengadakan siasatan baharu untuk mengambil keseluruhan tanah seluas 293 meter persegi tersebut, seperti yang dirancang pada asalnya, berserta dengan keseluruhan bangunan A2 supaya selepas pengambilalihan tiada bahagian mana-mana bahagian tanah yang belum diperolehi akan tertakluk kepada sebarang sekatan berhubung dengan rancangan pembangunan masa hadapan.

Diputuskan, menolak permohonan JR:

(1) Kekhuatiran yang dibangkitkan oleh pemohon bahawa mereka mungkin menghadapi sekatan jika mereka ingin memajukan tanah dan bangunan pada masa hadapan hanyalah bersifat spekulatif. Tiada keterangan bahawa mereka sebenarnya telah mengambil apa-apa langkah untuk memajukan tanah atau bangunan sebelum proses pengambilan tanah dan tiada keterangan positif sebarang kerugian serius atau sebenar yang dialami oleh pemohon pada masa pengambilalihan (lihat perenggan 37 & 52).

(2) Aktiviti-aktiviti yang dihadkan daripada dijalankan dalam Zon Perlindungan Keretapi (yang sudah pasti termasuk Rizab Pertama) dan seperti yang ditetapkan dalam Peraturan-Peraturan 1998 adalah semata-mata direktori dan tidak bersifat mandatori dan tidak menimbulkan sebarang halangan kepada mana-mana rancangan masa hadapan pembangunan untuk tanah atau bangunan. Oleh itu, keputusan yang dipertikaikan tersebut tidak menyalahi undang-undang, dan juga tidak melanggar perkara 13 Perlembagaan Persekutuan (lihat perenggan 35, 41–43, 46–47 & 53).

(3) Keputusan yang dipertikaikan tersebut juga tidak dicemari dengan ketidakwajaran atau salah guna kuasa kerana responden mempunyai kuasa di bawah Akta Pengambilan Tanah ('APT') untuk membuat keputusan untuk mengambil kawasan yang lebih besar sedikit atau lebih kecil daripada kawasan yang dinyatakan dalam *warta* kerajaan. Ini terbukti daripada perkataan dalam s 14(3) APT. Keperluan untuk memperoleh hanya kawasan tanah yang lebih kecil dalam kes semasa juga merupakan keputusan teknikal dan responden tidak boleh dipersalahkan kerana mengurangkan kawasan yang akan diperolehi selaras dengan pindaan yang dibuat kepada pelan susun atur asal oleh pemilik projek (lihat perenggan 54 & 56–57).

(4) Permohonan JR tidak mempunyai merit dan ianya harus ditolak (lihat perenggan 61–62).]

Cases referred to

Ahmad bin Saman v Kerajaan Negeri Kedah [2003] 4 MLJ 705; [2004] 1 CLJ 211, CA (folld)

Council of Civil Service Unions and others v Minister for the Civil Service [1985] AC 374, HL (refd)

Harpers Trading (M) Sdn Bhd NVational Union of Commercial Workers [1991] 1 MLJ 417, SC (refd)

Mamat bin Talib (Timbalan Ketua Polis, Johor) & Anor v Abdul Jalil bin Rashid [2006] 2 MLJ 108; [2005] 4 CLJ 892, CA (folld)

Pemungut Hasil Tanah, Daerah Barat Daya, Pulau Pinang v Ong Gaik Kee [1983] 2 MLJ 35, FC (refd)

Ringgit Exoticka Sdn Bhd v Pengarah Tanah & Galian Selangor & Ors [2014] 8 MLJ 111; [2013] 10 CLJ 663, HC (refd)

Selangor State Government & Anor v Kuala Lumpur Kepong Bhd [2017] 3 MLJ 205; [2017] 9 CLJ 31, CA (refd)

Syed Omar bin Abdul Rahman Taha Alsagoff & Anor v The Government of the State of Johore [1979] 1 MLJ 49, PC (refd)

Legislation referred to

Land Public Transport Act 2010 ss 2, 3, 8, 12, 14(3), 37(1)(a), (1)(b), 87, 88, Forms G, H, N

Railways (Railway Protection Zone) Regulations 1998 regs 3, 4, 4(2), 5, 5(2), 6, 8, Second Schedule, para 2, 2(1)(e)(i)

Railways Act 1991

Rules of Court 2012 O 53

Gan Techiong (with Wong Wan Ting) (Gan & Lim) for the applicant.

Muhammad Azzam bin Zainal (with Suhana bt Sabil) (Johor State Legal Advisor's Office) for the respondent.

Noor Hisham Ismail JC:

INTRODUCTION

[1] This was a judicial review application by the applicants under O 53 of the Rules of Court 2012 against the decision of the respondent dated 19 April 2021 in a land acquisition enquiry under the Land Acquisition Act 1960 ('the LAA').

[2] The said decision concerns with the respondent's action during the said enquiry to reduce the area of land to be acquired from 293sqmt as originally scheduled under s 8 of the LAA to a smaller area of 229sqmt and to that end

had left certain portion of the remaining land not acquired belonging to the first applicant and some part of a building currently erected thereon belonging to the second applicant to become encumbered as 'First Reserve of the Railway Protection Zone' under the Railways (Railway Protection Zone) Regulations 1998 ('the impugned decision').

[3] The reliefs prayed for in this judicial review application are essentially:

(a) an order of certiorari, to quash the impugned decision and consequential thereto to cancel Form G and Form H dated 19 April 2021 issued by the respondent under LAA; and

(b) an order of mandamus, to compel the respondent to hold a fresh enquiry to acquire the original area of 293sqmt as per the original layout plan and to acquire the whole of the said building so that post acquisition the whole of the remaining land would be free from any restrictions relating to Railway Protection Zone for future developments.

[4] At the conclusion of the hearing, I dismissed the application and the followings are the reasons for my decision.

SALIENT FACTS

[5] The first applicant is the registered owner of a piece of land held under HS(D) 259379 PTB 12478 Bandar Johor Bahru comprising an area of approximately 2,187.8666sqmt ('the said land').

[6] The second applicant is the tenant of the said land and have erected a temporary building above the said land with approval from the local authority ('the said building'). The said building is housed within it a restaurant operated by another third party.

[7] On 21 January 2021 the respondent caused to *gazette* a land acquisition notice under s 8 of the LAA to declare the government's intention to acquire part of the said land comprising an area of 293sqmt ('the Scheduled Land') along with other lands for the purpose of building a public railway line linking Johor Bahru and Singapore known as 'The Rapid Transit Link System Johor Bahru-Singapore Project At Mukim Bandar Johor Bahru In The District Of Johor Bahru' ('the project').

[8] Consequent to the notice, a land enquiry was scheduled to take place on the 7 April 2021 at the respondent's office.

[9] Prior to the hearing, the applicants' valuers were shown with the layout plan of the Scheduled Land at the respondent's office ('the original layout plan'). The original layout plan showed that:

(a) the Scheduled Land was demarcated to be of a straight line parallel to the proposed railway alignment;

(b) the Scheduled Land is located at the corner of the said land which has dual frontage -on its south facing Jalan Ibrahim Sultan and on its west facing Jalan Lingkaran Dalam; and

(c) part of the said building which is closer to corner of the said land will fall to be within the boundary termed as 'First Reserve' of the 'Railway Protection Zone' as prescribed under the Railways (Railway Protection Zone) Regulations 1998 ('the 1998 Regulation').

[10] On the date of the hearing, the respondent adjourned the hearing to 19 April 2021 at the request of the owner of the project ie the Malaysia Rapid Transit System Sdn. Bhd. ('MRTS') who informed the respondent that there would be an amendment to the area of land to be acquired in order to avoid the said building from being affected.

[11] A revised layout plan was subsequently prepared by MRTS and later handed to the applicants' respective valuer ('the revised layout plan'). The revised layout plan showed that:

(a) the area to be acquired would be reduced from 293sqmt to 229sqmt with no amendment to the alignment of the proposed railway line;

(b) due to the said reduction, there would be a 'left over' land in a 'zig zag' shape at the corner of the Scheduled Land as opposed to the original lay out plan which was a straight line parallel to the proposed railway alignment;

(c) part of the said building would no longer be affected by the acquisition; and

(d) the zig zag shape land and part of the said building would still fall within the 'First Reserve' of the 'Railway Protection Zone'.

[12] On 19 April 2021, the respondent proceeded with the enquiry and upon hearing all parties, decided to acquire 229sqmt based on the revised layout plan prepared by MTRS as opposed to 293sqmt as originally declared in the *gazette*. Although the applicants' directors objected to the decision, the respondent proceeded to award compensation to both applicants as stated in Form G and Form H of the LAA with no compensation given towards the zig zag shape land and part of the said building that had become encumbered as First Reserve of the Railway Protection Zone.

[13] Upon receiving the forms, both applicants filed their respective objections against the award in Form N under the LAA for the matter to be referred to the High Court as land reference proceeding.

[14] The applicants proceeded to file this judicial review application albeit the land reference still in motion. The cause for complaints were that the impugned decision:

(a) is illegal for leaving a zig zap shape at the corner of the Scheduled Land and part of the said building to be within the First Reserve of the Railway Protection Zone;

(b) is irrational for creating a 'zig zag' shape boundary line as opposed to the original straight line in the original layout plan;

(c) is unreasonable for imposing new restrictions upon private land/building without being properly compensated; and

(d) is an abuse of power under LAA 1960 solely to save the acquiring party from paying higher compensation for the said building.

THIS COURT'S ANALYSIS AND FINDINGS

[15] At the outset, I am of the view that the applicants cannot be said to have abused the court's process due to the simultaneous existence of this judicial review application and another land reference proceeding initiated by them on the same subject matter.

[16] Although I also recognise that there is a trite principle of law that judicial review can be refused upon the court being shown of other remedy — seeking process under the law not being fully exhausted by an applicant, I am of the view that such principle cannot be simply applied as a matter of right. Furthermore, in cases such as the instant application, authorities tend to show that decisions relating to land acquisition are susceptible for judicial review. In this regard, I find the case of *Ahmad bin Saman v Kerajaan Negeri Kedah* [2003] 4 MLJ 705; [2004] 1 CLJ 211 (CA) is instructive. The Court of Appeal in the said case had stated in uncategorical terms that land acquisition may be challenged on any of the following grounds:

(a) that the acquiring authority has misconstrued its statutory powers;

(b) that the purpose stated in the declaration does not come within s 3;

(c) where it can be shown that the acquiring authority has acted in bad faith; or

(d) that the acquiring authority has acted contrary to the law.

(See also: *Syed Omar bin Abdul Rahman Taha Alsagoff & Anor v The Government*

of the State of Johore [1979] 1 MLJ 49; *Pemungut Hasil Tanah, Daerah Barat Daya, Pulau Pinang v Ong Gaik Kee* [1983] 2 MLJ 35; *Ringgit Exoticka Sdn Bhd v Pengarah Tanah & Galian Selangor & Ors* [2014] 8 MLJ 111; [2013] 10 CLJ 663).

[17] Upon perusing the cause papers, I find the cause for complaints raised and the reliefs prayed for in this judicial review application are not similar to the ones generally dealt by the High Courts in land reference proceedings under the LAA.

[18] As such, I have to decline to the request made by the learned counsel for the respondent upon me to dismiss this application solely on the said multiplicity of proceedings ground which was raised during the opening of his submission as the respondent's preliminary point.

[19] Before I move on to consider the substantive merits of this application, it is perhaps useful at this juncture to set out the oft-quoted authority on judicial review as set out in the case of *Council of Civil Service Unions and others v Minister for the Civil Service* [1985] AC 374 ('CCSU') where at pp 410 and 411 Lord Diplock said:

> Judicial review has I think developed to a stage when without any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'.
>
> By 'illegality' as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, those persons, the Judges, by whom the judicial power of the state is exercisable.
>
> By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness (*Associated Provincial Pictures Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223). It applies to a decision so outrageous in its defiance of logic or of accepted moral standards that no sensible person who has applied his mind to the question to be decided could have arrived at it.
>
> I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred even where such failure does not involve any denial of natural justice.

[20] Now, the facts leading to the respondent's decision-making process were not much in dispute. Apart from alleging the respondent had failed to act fairly in exercising his quasi-judicial power during the land enquiry, it is the adverse consequences the impugned decision had caused to the applicants being most central that this court was invited to hold that the impugned decision by itself is illegal or irrational or an abuse of power within the sphere of administrative law.

[21] The position taken by the applicants is that, as a consequence of the impugned decision, the said land which were left in a zig-zag shape boundary line at its corner and some part of the said building were made to become statutorily encumbered as 'First Reserve of the Railway Protection Zone' thus subjecting both applicants to unnecessary legal restrictions under the 1998 Regulation should they wish to develop the said land and building in the future. This, according to the applicants, is a clear travesty of justice and in breach of art 13 of the Federal Constitution.

[22] In order to appreciate the applicants' position, I think it is necessary for me to firstly put things into perspective, especially on the relevant laws applicable to the facts.

[23] To begin with, it is common ground that the Railways Act 1991 (Act 463) was the main source of legislation relating to railways in the country. It also has its subsidiary legislation which provides for matters relating to 'railway protection zone' known as the Railways (Railway Protection Zone) Regulations 1998.

[24] However, the Railways Act 1991 no longer continues to be applicable in Peninsular Malaysia with the coming into force of Railways (Amendment) Act 2010 (A1377). It has been replaced with Land Public Transport Act 2010 (Act 715) which came into force on 31 January 2011 (except section 6 to 12) by virtue of His Majesty's *Gazette* PU (B) 43/2011 dated 31 January 2011.

[25] Be that as it may, s 8 of A1377 provides that all subsidiary legislations made under the Railways Act 1991 prior to the coming into force of A1377 shall continue to be in force in Peninsular Malaysia unless specifically amended or revoked. Thus, in the absence of any amendment or revocation towards the 1998 Regulation, it is common ground that the 1998 Regulation survives and applies in full force in Peninsular Malaysia. For ease of reference, s 8 of A1377 is reproduced below:

> 8(1) On the appointed date, the Railways Act 1991, hereinafter referred to as 'the Act', shall cease to apply to Peninsular Malaysia, except Part XII.
>
> (2) Notwithstanding the non-application of the Railways Act 1991 to Peninsular

A Malaysia, *all subsidiary legislation made or deemed to have been made or having effect under the Act prior to the appointed date shall, in so far as they are not inconsistent with the Land Public Transport Act 2010, continue to be in force and have effect in Peninsular Malaysia until they are amended or revoked by any subsidiary legislation made under the Land Transport Act 2010.* (Emphasis added.)

B

[26] Next, since the railway scheme to be developed by MRTS under the project is not disputed, it may well be said that the said scheme has been approved and therefore must be constructed by MRTS according to the plans as approved by the relevant authority under Act 715. Any acquisition of private C land for the purpose of the project is deemed for 'public purpose' and the acquisition process shall be undertaken in accordance with the LAA. Reference on that can be found at ss 87 and 88 of Act 715, reproduced below as follows:

87 Railway to be constructed according to approved plans

D (1) Any railway constructed under this Act shall be made and maintained according to the lines and levels shown on the deposited plans with all proper bridges, viaducts, stations, sidings, approaches, junctions, roads, buildings, yards, works and conveniences connected therewith and incidental thereto.

E (2) A railway route may deviate from the line of railway shown on the deposited plans, but no such deviation shall extend beyond the limits of deviation shown on the plans.

88 Private land may be acquired for railway

F (1) Such of the lands as are required for the purpose of constructing a railway and shown on the plans and sections and mentioned in the book of reference deposited under paragraph 84(2)(b) and if applicable, section 86, shall be deemed to be lands required for a public purpose within the meaning of the Land Acquisition Act 1960 [Act 486].

G (2) Proceedings under the Land Acquisition Act 1960 shall be taken separately in respect of each land shown on the plans and sections and mentioned in the book of reference.

(3) Nothing in this section shall prevent the acquisition of lands for the H purpose of constructing a railway by agreement between the railway company and the proprietors of such lands.

[27] Now, moving on to the complaints raised by the applicants, my observation would show that there is no specific definition of either 'First I Reserve' or 'Railways Protection Zone' assigned in Act 715 being the primary reference. As such, I find it necessary to look into the 1998 Regulation in order to understand how the impugned decision had adversely affected the applicants as contended by them. But before I proceed to do so, I must note that the 1998 Regulation must be applied 'in so far as they are not inconsistent

with the Land Public Transport Act 2010' as provided for in sub-s 8(2) of A1377 which I had highlighted earlier.

[28] Upon perusing through the 1998 Regulation, although there is no specific and precise definition given either to 'First Reserve' or 'Railways Protection Zone', I find that a 'Railway Protection Zone' refers to a specified identifiable area on the left and right side of a railway track and the said area must first be designated to be so by the Director General of Railways. Reference is made to reg 3 of the 1998 Regulation which reads as follows:

> Designation of railway protection zone
>
> The Director General shall designate an area in the railway premises as a railway protection zone, as described in Drawings A to F in the First Schedule.

[29] The definition of 'railway premises' in 1998 Regulation is almost identical to the one assigned in s 2 of Act 715, where it is provided that 'railway premises' means all premises under the control of or occupied or used by a railway company that is a licensed operator.

[30] Next, I also observe that the 'Railway Protection Zone' consists of a 'First Reserve' starting from the immediate left and immediate right of the railway track and a 'Second Reserve' immediately starting after the end of both left and right of the First Reserve. Such description with their respective measurements can be found in the technical drawings 'A' to 'F' incorporated as First Schedule to the 1998 Regulations.

[31] Having said that, it is necessary to emphasis that for the purpose of this judicial review application, it is common ground that the facts and issues to be resolved only concern with 'First Reserve' where the zig-zag shape land and part of the said building are located post acquisition.

[32] It was the contention of the applicants that the First Reserve is an area which should be kept clear for safety reasons, not only for the safety of the railway line but also for the safety of the public. The safety standards are as prescribed in the Second Schedule to the 1998 Regulation. Of concern to the applicants is the safety standards imposed on future development to be undertaken on the aboveground of the First Reserve as provided in para 2 in Second Schedule to the 1998 Regulations which reads:

> Above-ground structures
>
> 2(1) Drawings D in the First Schedule defines acceptable limits on excavations and ground surcharge adjacent to pile caps supporting above-grounds structures. The following requirements shall apply:
>
> (e) *no building shall be constructed within 6 metres of any aboveground structure*

measured from the outer edge of the aboveground structure unless it conforms to the following:

(i) *development shall not exceed one storey*

(ii) development shall have no basement;

(iii) the development shall be of non-combustible construction and shall have a fire-resistance rating for its elements of structure of not less than 2 hours;

(iv) at least 1 metre clearance (shown 'x' on Drawing E in the First Schedule) from top of the development's roof to underside of the above-ground structures beam shall be maintained. No projection above the surface of this roof shall be allowed. Development roofs shall be constructed such that above-ground structures access holes are inaccessible from them;

(v) all structures shall be kept at least 0.5 metre clear from the edge of the pilecaps or 2 metres clear from the edge of the bearings whichever is the more restrictive (shown (y) and (z) respectively on Drawing E in the First Schedule);

(vi) activities carried out shall be of low fire risk;

(vii) no use of piped gas and/or bottled gas shall be allowed;

(viii) no development is allowed to be built around or to enclose any above-ground structures column. All sections of aboveground structures shall be kept accessible to maintenance and vehicles;

(ix) the development shall be protected by approved automatic sprinkler system, if so required by the Director General;

(x) surface and roof run off from the development shall not interfere with the existing above-ground structures drainage system. The applicant shall bear all costs and expenses incurred in the diversion and reinstatements of the drains; and

(xi) exposed lightning conductor running along the surface of the above-ground structures column shall be protected.

[33] At this juncture, it is necessary to state there is no dispute that post acquisition, part of the said building within the First Reserve is located just about 1.589 meter away from the outer edge of the 'Viaduct Parapet' which is the aboveground structure to be built by MRTS roughly at the center of the acquired land.

[34] On this, the applicants relied heavily on the restrictions as imposed in the aforementioned para 2(1)(e)(i) of the 1998 Regulation which prohibits any building with more than one storey from being erected within 6 meters of any aboveground structure measured from the outer edge of the aboveground

structure. This, the applicants argued would certainly curtail their rights to develop the said land and building in the future.

[35] It was further contended by the applicants that the 1998 Regulation too has imposed restrictions against certain activities from being carried out within the railway protection zone which inevitably includes the First Reserve. The said activities, which are termed as 'restricted activities', are specifically prescribed in the Third Schedule of 1998 Regulation to consist the followings:

RESTRICTED ACTIVITIES

Restricted activities structures

1 (1) The following are defined as restricted activities:

(a) the erection of scaffolding, maintenance towers, hoardings, fencing, gantries, signs, lighting posts and similar structures where any part of that structure is within 6 metres on plan of above-ground, at-grade, portal structure, or ventilation shafts;

(b) the operation or movement of cranes, whether fixed or mobile, hoists, ladders, drilling and piling equipment, excavators and any other mechanical equipment or vehicles where any part of the said equipment or vehicle at any stage of its works is within 6m on plan of an aboveground, at-grade, or portal structure. The term 'movement' in this paragraph docs not include the passage of the equipment or vehicles along a public roadway. The operation of any equipment or vehicles of the fire service shall be excluded;

(c) the movement of any vehicle or trailer exceeding 5.3 metres in height within 6 metres on plan of an above-ground, or at-grade structure, unless minimum/maximum clearances are posted otherwise;

(d) the storage of materials, either loose, in pallet, or in containers within 6 metres on plan of an above-ground, portal or at-grade structure;

(e) the storage of Class I flammable and Class II Class III combustible liquids as defined under the NFP A code of practice and the storage of related pipework within 30 metres on plan of any above ground, at *grade* or underground structure;

(f) the storage of explosive materials within 30 metres on plan of any structure above or below ground or within 30 metres of any railway property; and

(g) the planting of trees within 6 metres on plan of an above-ground, at grade or portal structu.re or within the first reserve of underground structures.

(2) The standard restricted activity to be complied for the restricted activity stated in paragraph l(l)(a):

(a) any part of the scaffolding that extends above the level of track shall be at least 3 metres clear on plan of the above-ground, or at-grade structure;

(b) the scaffolding shall be so designed and positioned so that it is not possible for persons to climb onto any above-ground or at-grade structure;

(c) the scaffolding, etc, is sufficiently robust and maintained to satisfactory, standard so as to prevent collapse onto, obstruction of or danger to the railway structures;

(d) where deemed necessary by the Director General additional protection measures shall be provided to the railway, at the applicant's expense;

(e) the scaffolding etc shall not interface with the free flow of air into or out of ventilation shafts, ducts or grilles.

(3) The standard restricted activity to be complied for the restricted activity stated in paragraph l(l)(b):

(a) the jib of any lifting appliance or any other moving or stationery part of the mechanical equipment including its handled load shall not encroach within 3 metres on plan from the edge of the nearest aboveground or at-grade structure unless the equipment restricted to work beneath the above-ground structures;

(b) where deemed necessary by the Director General effective measures of protection to the above-ground or at-grade structures;

(c) the equipment and, where appropriate its foundation has been certified satisfactory for operation within the preceding two weeks prior to the application to the Local Authority.

(4) If the standard restricted activity in paragraph 1(3)(a) is not complied with, the Director General may consider giving permission for the use of the equipment only during the period when trains are not running.

(5) The standard restricted activity to be complied for the restricted activity stated in paragraph 1(1)(d):

(a) storage is not closer than 2 metres from any above-ground, at-grade, or portal structure;

(b) storage does not impose a load on the railway structure in excess of 15 kilopascal;

(c) storage is not higher than 4 metres or such that a person may be able to climb onto the above-ground or at-grade structures from the stored materials;

(d) material stored is of low combustibility.

(6) The standard restricted activity to be complied for the restricted activity stated in paragraph l(l)(e):

(a) storage is not closer than 7.6 metres from the outer wall of the underground structure;

(b) storage tanks containing Class I flammable liquids and Class II combustible liquids shall be installed underground in a cast-in-place reinforced concrete vault large enough to bold and retain the entire

contents of the tanks. The storage tank shall be completely encompassed by not less than 600 millimetres thick of while-washed sand;

(c) vaults, tanks and piping shall be protected from corrosion and have approved cathodic protection;

(d) the tank and all related piping shall conform to the provisions of NFPA 30 and the licensing requirements of the Local Authority;

(e) storage of Class II combustible liquids may be located above ground. The storage tank shall be placed within a masonry or welded steel, oil-tight vault, of adequate capacity to contain the contents of the tank. Masonry vaults shall be at least 150 millimetres thick and steel vaults shall be made of not less than 18 gauge metal;

(f) dispensing pumps for Class II flammable liquids and Class II combustible liquids shall not be located less than 7.6 metres from the face of such pump to the nearest side of any ventilation shafts opening or station entrance;

(g) the surface around the dispensing area whether with or without dispensing pumps shall be granded in a manner to direct any possible spills into a drain that flows away from the underground structures.

[36] Thus, combining the safety standards to be met and the restrictions of the activities imposed in the 1998 Regulation, both applicants contended that they are seriously prejudiced because future development for the said land would either be impossible and the said building shall also have to be demolished in the future, and all these are imposed against them with no compensation from the respondent or MRTS being the owner of the project.

[37] After giving careful considerations on the facts, complaints and the law, I have to say firstly that the concern raised by the applicants were mainly speculative about the future. I say this because as of the date of hearing of the land enquiry, there is no evidence shown by the applicant that they had in actual fact taken any step to develop the said land or building prior to the statutory land acquisition process. In other words, the applicants currently do not have any plan to develop the said land or building prior to the said acquisition.

[38] As such, I am of the view that the angle that I should take in ascertaining the merits of the applicants' complaints would be to visualize on what will be the fate of the applicants should they wish to develop the said land or the said building in the future.

[39] To start off with, I do not think that there is any necessity for me to discuss on the law on land development in the country, suffice to say in general that before any development on land to be undertaken by any person, approval from the relevant authority under the relevant law must first be obtained by

A that person. Perhaps on that basis, I too observe that there is no provision in the 1998 Regulation that requires approvals from the Director General of Railways before development of land can be undertaken within the railway protection zone.

B **[40]** Thus, I am of further view that the issue to be addressed is to what extent does the so-called restrictions under the 1998 Regulation had violated or curtailed the applicants' rights to undertake future development on the said land and building.

C **[41]** Upon perusing the 1998 Regulation and Act 715 as a whole, I am of the view that the so-called restrictions are directory and not mandatory in the first place.

D **[42]** For that, I firstly put my reliance on the wordings used in regs 4, 5 and 6 of the 1998 Regulation, where none of these provisions provides with certainty that the approval for development of land or restricted activities shall not be granted by the approving authority in case of no-compliance with the said restrictions. Regulations 4, 5 and 6 of the 1998 Regulation are reproduced E below in full as follows:

> 4 Issuance of development order or planning permission after consultation with Director General
>
> (1) The Commissioner or any local planning authority should consult with the Director General before issuing a development order or planning F permission regarding any development in the railway protection zone.
>
> (2) *If the consultation in subregulation (1) is not carried out, such failure shall not impede in whatsoever manner the Commissioner or any local planning authority from issuing such development order or planning permission.*
>
> G 5 Permission for restricted activity after consultation with Director General
>
> (1) A local planning authority should consult with the Director General before allowing any restricted activity to be carried out in the railway protection zone.
>
> H (2) *If the consultation in subregulation (1) is not carried out, such failure shall not impede in whatsoever manner the local planning authority from allowing any restricted activity to be carried out.*
>
> 6 Matter to be taken into cognisance before issuance of development order or planning permission or permission for restricted activity
>
> I The Director General shall ensure that the Commissioner or the local planning authority, as the case may be, prior to the issuance of the development order or the planning permission, and the local authority, *prior to allowing a restricted activity to be carried out, in the railway protection zone take cognisance of* —
>
> (a) the railway protection zone;

(b) all maps and drawings provided by the railway company;

(c) any possible effect on the safety of the railway structure or the operation of the railway as a result of the development or the carrying out of the restricted activities; and

(d) the safety standards and the restricted activities standards.

[43] The combine effect of regs 4, 5 and 6 of the 1998 Regulations to me would mean, although the approving authority ought to take cognisance of the safety standards in the Second Schedule and to make consultations with the Director General of Railways before approving any development plan or restricted activities within the railway protection zone, failure to conduct such consultations does not in any way impede the power of the planning authority to approve the development plan or the restricted activities to be undertaken within the said zone. For clarity, I reproduced the 'non-mandatory' nature of the restrictions as provided in regs 4(2) and 5(2) of the 1998 Regulation, as follows:

4(2) If the consultation in subregulation (1) is not carried out, such failure *shall not impede in whatsoever manner the Commissioner or any local planning authority from issuing such development order or planning permission.*

5(2) If the consultation in sub regulation (1) is not carried out, such failure *shall not impede in whatsoever manner the local planning authority from allowing any restricted activity to be carried out.*

[44] Still on the same footing, I observe that no offences too are prescribed either in the 1998 Regulation or Act 715 in case of any breach of the said restrictions. Hence, it is my considered opinion that no matter how simplistic it may sound, the law must always be construed in accordance with the meaning of the words as they are drafted and not what one thought the meanings of those words ought to be.

[45] In choosing to approach this issue on a discretionary/mandatory classification, I have to say that I am influenced with the dicta pronounced in *Mamat bin Talib (Timbalan Ketua Polis, Johor) & Anor v Abdul Jalil bin Rashid* [2006] 2 MLJ 108; [2005] 4 CLJ 892, where it was held by the Court of Appeal that:

The correct approach to determine whether a particular procedural provision is mandatory is not the fact that it employs words that prima facie carry a tenor of compulsion; for example, the word 'shall'. The correct test is that stated by Lord Woolf MR in *R v Immigration Tribunal ex parte Jeyeanthan* [1999] 3 All ER 231 which was applied by this court in *Mokhtar bin Amin v Mohamed Moktar bin Omar* [2001] 4 MLJ 329; [2001] 4 CLJ 489 and *Chong Keat Realty Sdn Bhd v Ban Hin Lee Bank Bhd* [2003] 3 MLJ 321; [2003] 3 CLJ 532. We quote from the judgment of the then Master of the Rolls:

> An examination of the relevant authorities, the leading textbooks and the numerous authorities to which they refer confirm the limitations of applying a solely mandatory/directory classification (see *Wade and Forsyth Administrative Law* (7th edn 1994) p 255; *Supperstone and Goudie Judicial Review* (2nd edn 1997) Ch 4 and de Smith, Woolf and *Jowell Judicial Review of Administrative Action* (5th edn 1995) pp 265-271). Frequently the investigation involves doing no more than deciding the sense in which the word 'shall' has been used as part of a particular procedural requirement. As the word 'shall' is normally inserted to show that something is required to be done, the exercise tends to be an unrewarding one. *Much more important is to focus on the consequences of non-compliance.* Here the authorities show no constant pattern. This is the result of courts in those cases focusing on the issue of whether or not a requirement is mandatory and ignoring or failing to pay sufficient attention to the issue of the consequences of non-compliance with, in particular, a mandatory requirement.'

[46] Thus, since the issue of non-compliance with the restrictions would carry no injunctive effect or criminal sanctions, I hold that the so-called restrictions in regs 4, 5 and 6 of the 1998 Regulation cannot in any way be held as violating or curtailing the applicants' future rights to undertake development on the said land and building rightfully belonging to them.

[47] Once again, since there is no evidence to show that the applicants had any planning permission approved for them or indeed had taken any steps to initiate any development plan on the said land or building prior to the land acquisition process, that would further fortify my conclusion that the applicants as they stood today before this court have only a speculative cause to worry about the future.

[48] In all fairness, I have to state my observation that had this court been shown otherwise (of the applicants' development planning) or that the applicants have been issued with certain stop work orders or other directions by the approving authorities that had affected the applicants' development planning or works, I would certainly have to take those facts into account, and my decision thereafter may or may not be the same as present.

[49] The necessity for me to express the abovesaid observation is due to another probable situation where under the 1998 Regulation the Director General is conferred with the power to recommend to the approving authority for suspension or cessation of development or the carrying out of the restricted activities in the said zone if the Director General is satisfied that the safety of any person using the railway is or has been or may be affected or the safety of the railway structure or the operation of the railway is or has been or may be affected. The relevant provision for that can be found in reg 8 of the 1998 Regulation which provides as follows:

> 8 Director General may recommend for suspension or cessation or development

Subject to any laws for the time being in force pertaining to the suspension or cessation of development, the Director General may make such necessary recommendation to the Commissioner of the local planning authority or such relevant authority, for the suspension or cessation of the development of the carrying out of the restricted activities, or to take any appropriate measure, upon the Director General being satisfied that

(a) the safety of any person using the railway is or has been or may be affected; and

(b) the safety of the railway structure or the operation of the railway is or has been or may be affected,

as a result of the said development or the carrying out of the restricted activities.

[50] Although such power of the Director General seems limited to only giving recommendation to the approving authority who at the end retains the final say, but on matters relating to safety of the public, I cannot rule out the possibility that such recommendation will not be taken lightly by the approving authority and may result with certain order or direction affecting the planning development or works to be issued against the applicants. Hence, had that been the case, the applicants' complaints must be taken to be real and not speculative and my assessment on the facts would certainly be different and may even change the outcome of my decision at the end.

[51] Next, assuming that I was wrong on the directory/mandatory classification approach that I took, I have to say that I find force in the argument advanced by the learned counsel for the respondent that even if the acquisition would not be in compliance with other laws, it would not render the impugned decision to be illegal. The case of *Selangor State Government & Anor v Kuala Lumpur Kepong Bhd* [2017] 3 MLJ 205; [2017] 9 CLJ 31 is on point, where Her Ladyship Tengku Maimun Tuan Mat JCA (as she then was, now Chief Justice) makes the following observation:

[29] More importantly, as highlighted by learned ALA, there is nothing in the LAA 1960 that requires compliance with other laws before the acquisition of the land can be validly done.

[52] Thus, in the absence of any development plan for the said land or building, I hold that there is no positive evidence as to any serious or actual loss having been sustained by the applicants at the time of the acquisition. In view thereof, I also hold that the applicants' complaint of a so-called restrictions imposed against them in the future is purely speculative in nature.

[53] Hence on similar account, it is my finding that the impugned decision does not offend the principles of illegality either under Lord Diplock's sense in CCSU or under art 13 of our very own Federal Constitution. Be that as it may,

I do not hesitate to add, if at all there are issues concerning the adequacy of compensation, the remedy would certainly lie in the land reference proceeding and not through

this court in exercising its supervisory jurisdiction.

[54] On other complaints by the applicants that the impugned decision was tainted with irrationality or an abuse of power on part of the respondent in reducing the area of land to be acquired that had left a zig-zag shape boundary line at the corner of said land, I find that the Land Administrator has the power under the LAA to decide to acquire an area slightly larger or smaller than the area stated in the government *gazette*. Such power can be derived from the wordings in s 14(3) of the LAA which provides as follows:

> (3) *An award under this section shall not be invalidated by reason only of the fact that the area in respect of which the award is made is greater or smaller than the area of scheduled land*:
>
> Provided that the difference between the area in respect of which the award is made and the area of scheduled land does not exceed one quarter of a hectare or one percentum of the area of scheduled land, whichever is the greater:
>
> And provided further that any person interested who is aggrieved by any increase in the area in respect of which the award is made may make an objection to the award in the manner prescribed by section 37.

[55] Since the issue on greater or smaller area would eventually touch on the measurement of the land and amount of compensation, it is my considered view that such issue is more appropriate to be canvassed before and decided by the relevant High Court in the land reference proceeding. The jurisdiction of the High Court to hear and decide on such issue is clearly provided in s 37(1)(a) and (b) of the LAA which reads as follows:

> 37 Application to Court
>
> (1) Any person interested in any scheduled land who, pursuant to any notice under section 10 or 11, has made a claim to the Land Administrator in due time and who has not accepted the Land Administrator's award thereon, or has accepted payment of the amount of such award under protest as to the sufficiency thereof, may, subject to this section, make objection to —
>
> (a) the measurement of the land;
>
> (b) the amount of the compensation;

[56] Further on the facts, I do not find any irrationality or abuse of power on part of the respondent when he acceded to the request made by MRTS to acquire a lesser area than the original lay out plan. The explanation proffered by the respondent in its affidavit in reply affirmed on 6 October 2021 (encl 23) states the following:

At paragraph 10.1:

> Keputusan untuk mengurangkan keluasan berkenaan dan sempadan kawasan yang diambil telah dibuat pada 7 April 2021 kerana permintaan daripada MRTS memandangkan terdapat perubahan rekabentuk tukup cerucuk pada jajaran RTS.'

At paragraph 19.1:

> Projek RTS ini adalah di bawah bidangkuasa Kementerian Pengangkutan/Kerajaan Persekutuan yang dilaksanakan oleh pihak MRTS bagi pihak Kerajaan Persekutuan. Penentuan keluasan tanah yang perlu diambil adalah di bawah bidangkuasa Kerajaan Persekutuan dan kepakaran MRTS. Pihak Berkuasa Negeri/Responden bertindak meluluskan keluasan yang sewajarnya berdasarkan kelulusan dan garis panduan yang ditetapkan oleh agensi yang berkaitan.

[57] In my view, on technical issue such as this, the respondent cannot be faulted in reducing the area to be acquired. What good will it make for the respondent to insist to follow with the original lay out plan when the acquiring authority themselves have given their reasons based on technical terms that the revised layout plan was more suitable to be adopted?

[58] I am also of further view that this issue concerns with question of fact which involves certain evaluation of evidence. In dealing with that I am mindful not to substitute the views of the respondent in exercising its quasi-judicial function during the land enquiry for it may tantamount to usur pation of power. In taking that stand, I am bound to apply the principles propounded by the Supreme Court (as it was then) in the case of *Harpers Trading (M) Sdn Bhd NVational Union of Commercial Workers* [1991] 1 MLJ 417, where it was held that:

> But where the dispute turns on a question of fact, about which there is a conflict of evidence, the court will generally decline to interfere.
>
> As Lord Diplock said in *R v Deputy Industrial Injuries Commissioner, ex p Moore* [1965] 1 QB 456 at p 488:
>
> > These technical rules of evidence, however, form no part of the rules of natural justice. The requirement that a person exercising quasi-judicial functions must base his decision on evidence means no more than it must be based upon material which tends to logically show the existence or non-existence of facts relevant to the issue to be determined, or to show the likelihood or unlikelihood of the occurrence of some future event the occurrence of which would be relevant. It means that he must not spin a coin or consult an astrologer, but he may take into account any material which, as a matter of reason, has some probative value, the weight to be attached to it is a matter for the person to whom Parliament has entrusted the responsibility of deciding the issue. *The supervisory jurisdiction of the High Court does not entitle it to usurp this responsibility and to substitute its own view for his.* (Emphasis added.)

[59] In any event, I am also of the view that whatever power conferred to the respondent must be exercised by him in accordance with the LAA. In respect of land enquiry, his purpose is confined to making enquiries as to the value of the land and to assess appropriate compensation to be awarded to all persons claiming compensation. The said purpose can be found in s 12 of the LAA which provides as follows:

> 12 Enquiry by the Land Administrator
>
> (1) On the date appointed under of subsection 10(1) the Land Administrator shall make full enquiry into the value of all scheduled lands and shall as soon as possible thereafter assess the amount of compensation which in his opinion is appropriate in each case, according to the consideration set out in the First Schedule:
>
> Provided that the Land Administrator may obtain a written opinion on the value of all scheduled lands from a valuer prior to making an award under section 14.
>
> (2) The Land Administrator shall also enquire into the respective interests of all persons claiming compensation or who in his opinion are entitled to compensation in respect of the scheduled land, and into the objections, if any, made by any interested person to the area of any scheduled land.
>
> (3) The Land Administrator may for a sufficient cause to be recorded by him in writing postpone any enquiry or adjourn any hearing of an enquiry from time to time.

[60] Thus, considering the purpose of the acquisition and the available affidavit evidence before me, the respondent's decision to reduce the area of the scheduled land cannot be said to be so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided, could have arrived at it. Consequently, I find that the impugned decision does not suffer from irrationality or tainted with abuse of power that would warrant it to be quashed by this court in the exercise of its supervisory jurisdiction. Again, if ever there arose out of the said decision issues concerning compensation, the rightful forum to hear and decide on such issues shall be the High Court in the exercise of its jurisdiction under the LAA in the land reference proceeding.

CONCLUSION

[61] As my final analysis, after taking all of the above into consideration, I find myself driven to the conclusion that there are no merits in all the complaints raised by the applicants in this judicial review application.

[62] Based on the foregoing, I dismissed this application with costs of RM5,000 subject to payment of allocator fees.

Judicial review application dismissed.

Reported by Ashok Kumar